Consequently, once the possession, custody or control of the chandu was proved (or as in this case, admitted), the onus of proof shifted, and it becomes the duty of the appellant to satisfy the learned District Judge that such possession was innocent. This was the only issue which he had to try.

The chandu was found concealed under a lot of clothing in a box belonging to the Appellant. Her explanation was that her daughter (a child of about 13) had picked up a bundle which contained 15 packets of non-Government chandu from a dustbin, and that she (Appellant) never saw the parcel till the Revenue Officers found them in her box.

The child, in her evidence, said the tins of chandu were in one big bundle which she found in a dustbin. She untied the parcel, and saw a number of packages like Exhibits Cl-15 and "thought the parcel might contain playthings." She told her mother she had found something in a dustbin, and her mother said: "Don't bring in rubbish." She took the parcel upstairs and put it in her mother's box.

In the child's statement to the Assistant Superintendent of Excise, made immediately after the raid, she said: "I took them (the packets) home and asked my mother what the packets contained, but my mother did not know. My mother told me to put the packets in the wooden box."

The District Judge in his Grounds of Decision dealt at great length with the improbabilities of this story, which I think are obvious to anyone reading the record.

The story sounds to me so improbable that even though I have not had the advantage of seeing the witnesses, I accept without any hesitation the District Judge's finding that the whole story was false. This was the best explanation the accused could offer, to account for the presence of this chandu in her box.

She failed completely to convince the District Judge that her possession was innocent; and, as I have said, this was a question of fact for the learned District Judge to decide, and one with which I can see no possible grounds for interfering. The appeal must, therefore, be dismissed.

As regards the sentence, since the penalty allowed by this Ordinance is 3 years rigorous imprisonment, it seems to me that the District Judge was lenient in imposing the imprisonment of 8 months simple imprisonment only, having regard to the quantity and value of the chandu seized.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

McELWAINE, C.J.

September 24, 1938.

REX v. M. SIVAPRAKASAM & ANOTHER.

[MALACCA CRIMINAL APPEAL No. 7 of 1938]

Liquors Revenue Ordinance (Cap. 225), s. 57 —Restriction on Sale of Toddy.

When an accused is charged with selling toddy without a licence the onus of proving the existence or non-existence of a licence rests upon the person licensed not upon the Crown.

MAGISTRATE'S APPEAL.

Storr, Crown Counsel for the Crown.

Goho for appellants.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

McELWAINE, C.J.—This is an appeal by the second appellant from a conviction for selling toddy without a licence, and by the first appellant from a conviction for abetment of the offence of the second appellant.

The case was under section 57 of the Liquors Revenue Ordinance (Chapter 225).

The first ground of appeal was that the onus was on the Crown to prove that there was no licence and that no evidence to this effect was tendered. Although this ground of appeal was abandoned *in limine* by Mr. Goho, it is desirable to say a word about it having regard to the old local case and *Rex* v. *Green*, (1888) 4 Ky. 401, (1888) 1 S.L.J. 53.

Section 57 enacts that "no person, other than a person in whom the exclusive right mentioned in section 55 is vested or a person licenced under section 51(2), shall sell or offer for sale or permit to be sold or offered for sale any toddy."

The section is prohibitory subject to two exceptions.

R. v. *Green* (*supra*) is the same case as that which is twice and somewhat differently digested in paragraphs 973 and 974 of Dr. Withers Payne's Malayan Digest, under the name of *Green* v. *Govinda* and *R.* v. *Green*. Paragraph 974 appears to me to be the more accurate. The section applicable in *Green's* case was very differently worded to the section before me, and in any case Wood, J. said "I do not decide the question on whom is the *onus probandi* of proving the non-existence of a licence; I entertain doubts whether it does not lie on the prosecution on the authority of the *Municipal Commissioners* v. *Chuah Seng*, (3 Ky. 140), but I am not quite satisfied with that case." *Chuah Seng's* case was decided before section 106 of the Evidence Ordinance was enacted, but it is also at variance with the note in *Stone's* Justices Manual at p. 1030 "The burden of proof that a house is licensed rests on the

person licensed" for which *Turner* v. *Johnston*, 51 J. P. 22 is cited as an authority: *R.* v. *Scott*, 86 J. P. 69 to which report I have not access, appears to be to the same effect.

Possibly, there was a special section in the Acts under which *Turner* v. *Johnston* and *R.* v. *Scott* were decided such as section 51(4) of the Licensing Act 1872.

In the case before me the charge uses the words "without a licence" and *The King* v. *Turner* 5 M. & S. 206; *Apothecaries Company* v. *Bentley*, Ry. & Moo, 159 as well as section 106 of the Evidence Ordinance indicate that Mr. Goho was right in abandoning this ground of appeal.

The second ground of appeal was that it was undesirable that the prosecution should be conducted by an important witness for the Crown.

A prosecution must, of course, be fairly conducted, but I know of no rule preventing the officer who probably laid the information and who is the real prosecutor, giving evidence. *Duncan* v. *Toms*, 16 Cox C.C. 267. He should, of course (as in this case) be the first witness called.

The rest of the appeal was founded on the evidence in the case. That evidence, if trustworthy, clearly established a sale of liquor by the appellant Thamboo, abetted by the appellant Sivapragasam, to Revenue Officer No. 12.

Mr. Goho has gone through the evidenec with a fine comb. I think it improbable that Revenue Officer No. 13 could have seen the mug in Revenue Officer 12's hand when he entered the premises, and it is not safe to accept this witness. The other discrepancies do not impress me. Mr. Trumble may have misunderstood Revenue Officer 12 when he says that that Revenue Officer reported having purchased two mugs of toddy instead of the one to which the Revenue Officer deposed.

The second accused says he put toddy into two mugs.

Everything happened in a very short space of time and meticulous accuracy as to trifling details is not under the circumstances to be expected.

Mr. Goho drew attention to the fact that the 10 cents which the Revenue Officer said he paid for the drink was not found. The evidence does not indicate that there was any search for it.

The last ground of appeal was that the magistrate did not consider the evidence of the defence. He certainly does not deal with it in detail.

The first accused's evidence was that he was not present until after the arrest of the second accused. No crown witness was cross-examined on this point and the second accused gave no evidence on it.

The defence of the second accused was a denial of a sale. He did not say he treated Revenue Officer No. 12 to a drink. He gives no explanation for pouring toddy into two mugs.

The phrase "such denial is not sufficient to warrant the discarding of the evidence of the second and third witnesses on this point" is not a happy one.

The onus is on the prosecution to prove its case beyond reasonable doubt, not on the accused to prove his innocence. But I think that what the magistrate meant was that he believed the Revenue Officers and that the accused's evidence raised no doubt in his mind as to the substantial accuracy of the Revenue Officers.

I am quite certain all points in his client's favour were clearly and emphatically stressed before the magistrate by Mr. Goho who defended in the lower Court.

There was abundant evidence to justify the magistrate in the conclusion at which he arrived.

The appeal is dismissed.

Appeal dismissed.

END OF STRAITS SETTLEMENTS OFFICIAL REPORTS.